Richallenge Corp Sdn Bhd v Poteck Enterprise Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(NCvC)(W)-2545–12 OF 2017
ABDUL RAHMAN SEBLI, MARY LIM AND HASNAH HASHIM JJCA
10 FEBRUARY 2020

Contract — Termination — Wrongful termination — Whether main contractor's termination of subcontract did not comply with terms and conditions of subcontract — Whether termination wrong in law and invalid — Whether facts showed subcontractor had not committed any fundamental breach which went to root of contract — Whether trial judge misapplied s 40 of the Contracts Act 1950 on misapprehension that there was total failure of consideration on subcontractor's part — Whether in fact subcontractor partially performed contract and s 40 therefore had no application — Contracts Act 1950 s 40

The respondent ('Poteck') was the main contractor of a project awarded to it by the Ministry of Education ('MOE'). Poteck appointed the appellant ('Richallenge') as its subcontractor. On the ground that Richallenge had failed to commence works as scheduled and had delayed the completion of the project, Poteck terminated its subcontract agreement ('the SCA') with Richallenge. Richallenge denied the accusations and sued Poteck for unlawful termination. The High Court dismissed Richallenge's claim and allowed Poteck's counterclaim for losses and damages. The trial judge found that Richallenge had failed to commence the subcontract works as scheduled and this amounted to a fundamental breach that went to the root of the contract entitling Poteck to terminate the SCA. In the instant appeal against the decision, Richallenge submitted that the trial judge erred in holding that there was a total failure of consideration on its part and consequently Poteck had the right to terminate the SCA under s 40 of the Contracts Act 1950. Richallenge said that not only had it part-performed the subcontract but during the trial, Poteck's general manager, DW4, had testified that the physical progress of the project was at 81% and MOE had paid Poteck about half of the project's total contract sum. Richallenge said MOE had also granted Poteck three extensions of time to complete the project due to inclement weather and various other factors beyond Poteck's control without issuing any certificate of non-completion or claiming liquidated and ascertained damages against Poteck. As such, Richallenge said there was no justification for Poteck to terminate the SCA on the avowed reason that it had delayed the completion of the project. Richallenge also submitted that if in fact its performance was 5% or more behind schedule, cl 11.3 of the SCA required Poteck to issue a notice to that effect and require Richallenge to remedy the breach within 14 days failing which Poteck could engage another contractor to complete the works.

However, no such notice was issued by Poteck. Clause 9 of the SCA provided that if Richallenge did not complete the project or any part thereof within the period (including extended periods) specified by the main contract, it shall pay Poteck a sum equivalent to the liquidated damages Poteck had to pay MOE. Clause 10.1 provided that Poteck 'shall not determine' the SCA unless MOE had determined the main contract because of any breach of the SCA by Richallenge.

Held, unanimously allowing the appeal, setting aside the High Court's decision, entering judgment for the appellant and remitting the case back to the High Court for assessment of damages for wrongful termination:

(1) The decision of the trial judge was plainly wrong. In determining that there was a fundamental breach of the SCA, the judge had not examined and considered the terms of the SCA in detail. The factual matrix of the case had to be considered together with the terms of the SCA. Based on the terms and conditions of the SCA, the termination by Poteck was wrong in law for non-compliance with cll 10 and 11.3 of the SCA (see paras 23–24, 37 & 44).

(2) Clause 10 of the SCA provided that Poteck shall not terminate the SCA unless the main contract between itself and MOE had been determined by MOE. In this case, the main contract still subsisted and there was no evidence MOE had intended to terminate, or had terminated, the main contract. There was also evidence that Richallenge had complied with more than 5% of the approved work schedule. Poteck's general manager, DW4, had on 29 October 2013 in the minutes of meeting reported that the physical progress of the project was more than 81% (see para 33).

(3) Whether there was a valid termination of the SCA depended on whether there was a valid reason to terminate as stipulated by the terms of the agreement. The SCA gave a right of notice to rectify a breach. If no notice was given, the party allegedly in breach would not know of the breach complained of and thus be unable to take necessary steps to rectify. Having examined the terms of the SCA in its entirety, this court was of the view that the termination was bad in law. In the first place, pursuant to cl 10, termination of the SCA was not permitted unless the main contract had been terminated (which was not the case here). Secondly, cl 11.3, as the termination clause, allowed Poteck to appoint another contractor to complete the works only if notice had been given to Richallenge to rectify an identified breach within a given time and Richallenge had failed to rectify the breach. Poteck had ignored the express contractual terms with regard to termination when it decided to terminate the SCA. Clause 11.3 could not be read independently of cl 10 in order to subvert the true intent of that clause (see paras 34–35 & 37).

(4) The trial judge had misapplied s 40 of the Contracts Act 1950 to the facts of the case to conclude that Poteck had lawfully terminated the SCA. Under s 40, the right of a non-defaulter to repudiate a contract only accrued when the defaulter had refused to perform or had disabled himself from performing his promise in its entirety. If there was part-performance, the non-defaulter could not put an end to the contract. On the facts of the instant case, Richallenge had partially performed its obligations under the SCA (see paras 38 & 43).

[Bahasa Malaysia summary

Responden ('Poteck') adalah kontraktor utama untuk projek yang diberikan kepadanya oleh Kementerian Pendidikan ('KP'). Poteck telah melantik perayu ('Richallenge') sebagai subkontraktornya. Dengan alasan bahawa Richallenge telah gagal untuk memulakan kerja seperti yang dijadualkan dan telah menunda penyelesaian projek, Poteck telah membatalkan perjanjian subkontraknya ('PSK') dengan Richallenge. Richallenge menafikan tuduhan itu dan telah menyaman Poteck atas pembatalan yang tidak sah. Mahkamah Tinggi menolak tuntutan Richallenge dan membenarkan tuntutan balas Poteck atas kerugian dan ganti rugi. Hakim perbicaraan mendapati bahawa Richallenge telah gagal untuk memulakan kerja subkontrak seperti yang dijadualkan dan ini merupakan pelanggaran yang sampai ke asas kontrak yang telah memberikan hak kepada Poteck untuk membatalkan PSK. Dalam rayuan segera terhadap keputusan tersebut, Richallenge telah berhujah bahawa hakim perbicaraan telah terkhilaf dengan beranggapan bahawa terdapat kegagalan pembalasan sepenuhnya di pihaknya dan yang mengakibatkan Poteck berhak untuk membatalkan PSK di bawah s 40 Akta Kontrak 1950. Richallenge menyatakan bahawa bukan sahaja telah melaksanakan sebahagian daripada subkontrak tetapi semasa percubaan, pengurus besar Poteck, DW4, telah memberi keterangan bahawa tahap penyempurnaan fizikal projek adalah pada 81% dan KP telah membayar Poteck sekitar separuh daripada jumlah keseluruhan kontrak projek tersebut. Richallenge menyatakan bahawa KP juga telah memberikan Poteck tiga lanjutan masa untuk menyelesaikan projek ini kerana cuaca buruk dan pelbagai faktor lain di luar kawalan Poteck tanpa mengeluarkan sebarang perakuan tidak selesai atau menuntut ganti rugi yang dipersetujui terhadap Poteck. Oleh itu, Richallenge menyatakan tidak ada alasan bagi Poteck untuk membatalkan PSK dengan alasan bahawa ia telah menangguhkan penyelesaian projek tersebut. Richallenge juga berhujah bahawa sekiranya kerjanya 5% atau lebih di belakang jadual, klausa 11.3 PSK memerlukan Poteck untuk mengeluarkan notis berkenaan perkara itu dan meminta Richallenge untuk remedi akan pelanggaran tersebut dalam masa 14 hari dan jika gagal Poteck dapat melantik kontraktor lain untuk menyelesaikan kerja tersebut. Namun, tiada notis yang diisukan oleh Poteck. Klausa 9 PSK memperuntukkan bahawa sekiranya Richallenge tidak menyelesaikan projek atau sebahagian daripadanya dalam jangka masa (termasuk jangka masa lanjutan) yang ditentukan oleh kontrak utama, pihaknya akan membayar

Poteck sejumlah wang yang setara dengan ganti rugi yang harus dibayar oleh Poteck kepada KP. Klausa 10.1 memperuntukkan bahawa Poteck 'tidak akan menentukan' PSK melainkan KP telah menentukan kontrak utama kerana pelanggaran PSK oleh Richallenge.

Diputuskan, dengan sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, memberi penghakiman menyokong perayu dan menyerahkan kembali kes itu ke Mahkamah Tinggi untuk penilaian ganti rugi atas pembatalan yang tidak sah:

(1) Keputusan hakim perbicaraan adalah jelas salah. Dalam menentukan bahawa terdapat pelanggaran PSK yang asas, hakim tidak memeriksa dan mempertimbangkan syarat-syarat PSK secara terperinci. Matriks fakta kes harus dipertimbangkan bersama dengan syarat-syarat PSK. Berdasarkan terma dan syarat PSK, pembatalan oleh Poteck adalah salah undang-undang kerana tidak mematuhi klausa 10 dan 11.3 PSK (lihat perenggan 23–24, 37 & 44).

(2) Klausa 10 PSK memperuntukkan bahawa Poteck tidak akan membatalkan PSK melainkan kontrak utama di antara dirinya dan KP telah ditentukan oleh KP. Dalam kes ini, kontrak utama masih berjalan dan tiada bukti KP mempunyai tujuan untuk menamatkan, atau telah menamatkan, kontrak utama. Terdapat juga bukti bahawa Richallenge telah mematuhi lebih dari 5% dari jadual kerja yang diluluskan. Pengurus besar Poteck, DW4, pada 29 Oktober 2013 dalam minit mesyuarat telah melaporkan bahawa kemajuan fizikal projek itu telah melebihi 81% (lihat perenggan 33).

(3) Sama ada pembatalan PSK adalah sah bergantung pada samaada terdapat alasan yang sah untuk pembatalan sebagaimana yang didapat dalam syarat-syarat perjanjian tersebut. PSK memberikan hak untuk mendapat notis untuk memperbaiki pelanggaran. Sekiranya tidak ada notis diberikan, pihak yang didakwa melakukan pelanggaran tidak akan mengetahui pelanggaran yang telah diadukan maka tidak dapat mengambil langkah yang diperlukan untuk membetulkannya. Setelah meneliti syarat-syarat PSK secara keseluruhan, Mahkamah ini berpendapat bahawa pembatalan itu tidak sah dari segi undang-undang. Pada asalnya, menurut klausa 10, pembatalan PSK tidak dibenarkan melainkan kontrak utama telah ditamatkan (yang tidak berlaku di sini). Kedua, klausa 11.3, sebagai klausa pembatalan, membenarkan Poteck untuk melantik kontraktor lain untuk menyelesaikan kerja hanya jika notis telah diberikan kepada Richallenge untuk membetulkan pelanggaran yang dikenal pasti dalam waktu tertentu dan Richallenge telah gagal memperbaiki pelanggaran tersebut. Poteck telah mengabaikan syarat kontrak yang jelas berkenaan dengan pembatalan ketika memutuskan untuk membatalkan PSK. Klausa 11.3 tidak boleh

dibaca secara berasingan daripada klausa 10 untuk mengabaikan maksud sebenar klausa itu (lihat perenggan 34–35 & 37).

(4) Hakim perbicaraan telah salah dalam mengunapakai s 40 Akta Kontrak 1950 pada fakta kes untuk menyimpulkan bahawa Poteck telah secara sah membatalkan PSK. Di bawah s 40, hak orang yang tidak melakukan pelanggaran untuk membatalkan kontrak hanya dikenakan apabila pihak yang ingkar menolak untuk melaksanakan atau telah menggagalkan dirinya daripada menunaikan janjinya secara keseluruhan. Sekiranya terdapat sebahagian penyempurnaan, pihak yang tidak ingkar tidak dapat menghentikan kontrak. Mengenai fakta kes, Richallenge telah melaksanakan tanggungjawabnya berdasarkan PSK (lihat perenggan 38 & 43).]

Cases referred to

Attorney General of Belize and others v Belize Telecom Ltd and another [2009] UKPC 10, PC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675; [1997] 1 CLJ 287, CA (refd)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302; [1987] 1 CLJ 123; [1987] CLJ Rep 102, SC (refd)

Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151; [1983] 1 CLJ 178; [1983] CLJ Rep 363, FC (refd)

Tan Kok Siang v Kemuning Setia Sdn Bhd [2018] 6 MLJ 652; [2018] 8 CLJ 546, CA (refd)

Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 601, HL (refd)

Legislation referred to

Contracts Act 1950 s 40

Appeal from: Suit No BKI-22NCVC-75/7 of 2015 (High Court, Kota Kinabalu)

Brenddan Soh (Ronny Cham & Co) for the appellant.
Joan Goh (Goh & Assoc) for the respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] This appeal by the appellant is against of the decision of the learned judicial commissioner who had dismissed the appellant's claim for unlawful termination and for the damages to be assessed. The High Court allowed the respondent's counterclaim of RM1,537,226 for losses and damages. After

A having heard and considered the submission of the respective counsel for the parties, we had allowed the appeal and set aside the decision of the High Court. We remitted the case before the same High Court judge for assessment of damages. We now give our reasons.

B **[2]** For the purpose of this judgment, the parties will be referred to as they were in the High Court.

MATERIAL FACTS

C **[3]** The defendant is the main contractor of a project described as 'Cadangan Pembangunan Projek Pendidikan Bagi SMK Tandek 2, Kota Marudu, Sabah' ('the project') awarded by the Ministry of Education ('MOE') ('the employer'). The contract sum for the project is RM41,445,000 ('the contract sum'). The defendant appointed the plaintiff as its subcontractor on D 28 July 2009. The expected completion date of the project was on 25 May 2011. However, the completion date was extended to 27 April 2012 ('the first EOT'). By the terms of the subcontract agreement ('SCA') it was agreed by the parties that the defendant's entitlement was 15% of the total contract sum, E which is RM6,216,750.

[4] The plaintiff's claim against the defendant is for unlawful termination of the SCA. The defendant, on the other hand, denied that it had unlawfully terminated the SCA. It had terminated the SCA due to the persistent failure of F the plaintiff to commence works as scheduled resulting in the delay of completion of the project. Due to the plaintiff's breach the plaintiff is estopped from relying strictly on the terms of the SCA. The plaintiff, however, contended that it had duly commenced the works as scheduled but there were many factors beyond its control which consequently led to the delay in the G completion of the project as scheduled (such as inclement weather and other factors).

[5] At the trial in the High Court the plaintiff called two witnesses, the consulting architect ('PW1') and the plaintiff's director, PW2. The defendant H called four witnesses, the director (DW1), the consultant quantity surveyor (DW2), a former officer of the MOE (DW3) and its general manager (DW4).

[6] It was highlighted by learned counsel for the plaintiff that it was recorded in the minutes of meeting that as at 29 October 2013 the physical I progress of the project was 81% and that the defendant has been paid approximately 50% of the contract sum. The defendant in its defence pleaded that under the terms of the SCA the defendant as the main contractor of the project has the right to terminate the subcontract. On 29 September 2014 the defendant terminated the SCA. On 20 October 2014 the defendant through

its solicitors notified the plaintiff of its intention to invoke cl 11.3 and on 8 January 2015 the defendant took over the project. The plaintiff argued that there was no express termination in writing given by the defendant as cl 10 of the SCA does not allow the defendant to terminate the subcontract. Furthermore, the second extension of time was subsequently granted by the employer on 13 November 2014 extending the completion date to 6 September 2015 ('the second EOT').

THE PLAINTIFF'S ARGUMENTS

[7] The plaintiff's submission is that the learned judicial commissioner had erred in law by solely relying on the case of *Tan Kok Siang v Kemuning Setia Sdn Bhd* [2018] 6 MLJ 652; [2018] 8 CLJ 546 and concluding that there was a fundamental breach of contract by the plaintiff. The learned judicial commissioner misapplied s 40 of the Contracts Act 1950 in determining that there was a total failure of consideration on the part of the plaintiff. Learned counsel for the plaintiff advanced several arguments in support of those submissions, contending that the finding by the High Court is fundamentally flawed. He argued that the plaintiff could not be said to be behind schedule as not only had the employer granted the second EOT but the progress of works was 81% as confirmed by DW4 in evidence. In *Tan Kok Siang*'s case relied by the learned judicial commissioner, the court referred to the Federal Court case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 where it was held under s 40 of the Contracts Act 1950 the right of the non-defaulter to repudiate a contract only accrues when the defaulter refused to perform or disabled himself from performing the whole of his promise. If there is part performance the innocent party may not put an end to the contract. In the light of the above and the facts before the court there was no total failure of consideration.

[8] Learned counsel for the defendant in response argued that the plaintiff was incapable of completing the project due to its financial woes at the material time. The defendant alleged that the plaintiff refused to commence works and instead gave all kinds of excuses and/or reasons for the failure to commence the works as scheduled. The plaintiff did not have the financial capacity and means to complete the project. Furthermore, there was an order to wind up the plaintiff. The plaintiff applied for a stay of that order which was granted on 5 November 2014. In fact, the plaintiff cannot complete the project because the official receiver ('OR') was controlling the affairs of the plaintiff. Sometime in March 2013, the plaintiff abandoned the project and this according to the defendant tantamount to a fundamental breach of the SCA which entitled the defendant to terminate the subcontract.

[9] It was confirmed on 13 November 2014 that the defendant obtained the second EOT from the employer extending the date of completion of the project from 27 April 2012–6 September 2015. The second EOT was granted due to inclement weather and factors beyond the control of the defendant. With the second EOT the plaintiff would have more time to complete the project. The employer did not issue a certificate of non-completion nor did they claim liquidated ascertained damages ('LAD'). PW1 testified that the defendant had obtained a third extension of time ('third EOT') further extending the completion date to 10 April 2017. It was therefore unconscionable for the defendant to rely on the alleged delay to justify terminating the plaintiff when the defendant had obtained the second EOT and applied for the third EOT.

[10] In response, the defendant contended that cl 11.3 of the SCA clearly provides that the defendant may terminate the contract without prejudice to any right of action or other remedies it may have against the plaintiff. According to the defendant the plaintiff did not disclose to the defendant of the winding up order.

[11] Learned counsel for the plaintiff argued that the defendant should not be permitted to ignore the terms and conditions of the SCA to the detriment of the plaintiff.

THE HIGH COURT

[12] The plaintiff appeals against the judicial commissioner's decision on grounds which may be summarised as follows:

(a) the learned judicial commissioner misdirected himself in law and fact by deciding that the defendant lawfully terminated the SCA when cl 10 of the SCA expressly states that the defendant shall not determine the agreement unless the main contract with the employer is determined in consequence of any breach of the SCA. The defendant's main contract has not been terminated by the employer at that material time;

(b) the defendant was in breach of cl 10 SCA;

(c) the defendant's allegation that the plaintiff delayed the completion of the project was unsubstantiated as EOT was granted by the employer extending the completion date to 6 September 2015. A further EOT was granted extending the completion date to 10 April 2017. The plaintiff did not breach the terms of the agreement; and

(d) the learned judicial commissioner failed to appreciate that the plaintiff had obtained a stay of the winding up order on 5 November 2014.

WHETHER THERE WAS A FUNDAMENTAL BREACH OF THE TERMS OF SCA

[13] Having considered the facts and evidence before him the learned judicial commissioner found that there was a fundamental breach of the agreed terms. The defendant had the right under the subcontract to terminate on the grounds that the plaintiff persistently failed to commence the works despite clear written request to do so. This amounts to a fundamental breach that goes to the root of the contract. The learned judicial commissioner in his grounds of judgment gives his reasons as follows:

> 59 ... Based on the finding of facts on the above matters, I find that there was failure to commence the subcontract works and there was no reasonable justification that had been adduced by the plaintiff in its evidence to support its claim that it intended to continue with the performance of the subcontract works. In the circumstances, this court is of the view that there was a breach of the SCA. The said breach although did not come within cl 10 of the SCA, the defendant in my view may still rely on the provision 'without prejudice to any right of action or other remedies that the Main Contractor may have against the Sub-Contractor' in cl 11.3 to exercise its rights against the plaintiff if there is a breach of the term of the contract.
>
> (See: p 30 of the grounds of judgment).

[14] The learned judicial commissioner further explained and concluded:

> Applying the principles in the above case to the present facts and the findings as stated earlier, this court has to determine whether the failure or refusal to commence the subcontract works is a breach of such a fundamental nature that goes to the root of the contract and not merely a breach of a subsidiary matter that does not entitle the defendant to put an end to the contract. In respect of this issue, I am of the view that the refusal to commence or continue with the works in this case amounts to a fundamental breach that goes to the root of the contract as the main obligation of the plaintiff under the SCA is to complete the subcontract works. In this respect, even though the plaintiff has stated that it was willing and had the intention to continue with the works, this in my view are mere promises with no concrete evidence to support its intention to continue with the subcontract works does not do so much to support the plaintiff's case.
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> (See: p 36 of the grounds of judgment).

[15] The plaintiff took the position that it was waiting for the second EOT to be approved before continuing with the works. The defendant disputed this and contended that there was no justification to wait for the second EOT to be approved. In respect of this issue the learned judicial commissioner agreed with the defendant's contention that there was no justification for the extension of time:

> 59 (I) ... In respect of this issue, I agree with the defendant's contention that there was no justification for the plaintiff to wait for the extension of EOT 2. If there is a

need for the evidence to show it was not justified, the evidence can be seen from the cross-examination of the plaintiff's own witness, PW1. PW1 is the lead consultant of the project and his evidence on the matter in my view carries weight and can safely be relied by the court.

(See pp 25–26 of the grounds of judgment).

FINANCIAL DIFFICULTIES

[16] The defendant submitted that from the very beginning of the construction of the project the plaintiff was already in dire straits and was always late, and as a result delayed the completion of the project. The contemporaneous evidence shows that the plaintiff was in financial difficulties and incapable of completing the project as scheduled. It was not disputed that the plaintiff was wound up. The plaintiff had refused or was not able to commence the works despite repeated requests by the defendant and assurances made by the plaintiff itself to do so. The learned judicial commissioner accepted the evidence given of the plaintiff's own witnesses confirming the status of the plaintiff as well as its reluctance to commence the works:

59(ii) ... In respect of the issue of financial difficulties, I prefer to rely on the evidence of the plaintiff's own witnesses that was called to give evidence. Again, PW1's (sic) evidence in the cross-examination, support this proposition. I prefer to accept his evidence as he is a neutral witness and had first-hand knowledge and background of the project at the material time as he was the lead consultant.

(See: p 27 of the grounds of judgment).

THE STOP WORK ORDER BY THE DEPARTMENT OF ENVIRONMENT (DOE)

[17] In respect of the stop work order the learned judicial commissioner found no merit in the contention and was of the considered view that the order relates to earth work and not the works under the SCA, the plaintiff cannot rely on this contention as an excuse for the delay and refusal to commence with the works under the SCA. There was a failure to commence works and no reasonable justification adduced by the plaintiff in its evidence to support the claim that it intended to continue with the performance of the subcontract works.

THE COUNTERCLAIM

[18] In respect of the counterclaim it was not disputed that the plaintiff did not seriously challenge the evidence of the defendant on the basis that the termination was unlawful. However, since the learned judicial commissioner found that the termination of the SCA was lawful, there was sufficient evidence

adduced by the defendant that it was entitled to the claim. The defendant had to engage a new contractor to complete the works, Bangkit Energy & Pro Logistics (EM) Sdn Bhd ('Bangkit Energy'). The defendant adduced evidence to show that there were ten interim claims submitted by Bangkit Energy totaling the sum of RM19,831,800 and out of this amount 8% (RM1,437,544) was paid to the defendant. The learned judicial commissioner found that the defendant had proved its counterclaim on the balance of probabilities and allowed the sum of RM1,537,226:

> In this respect since I have made a finding that the termination of the SCA is lawful, I now will consider the evidence for the purpose of the counterclaim. As the evidence was unrebutted, I think it would suffice to say that sufficient evidence had been adduced by the defendant in the present case to show that it was entitled to the claim therein.
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> (See pp 37–38 of the grounds of judgment).

THE APPEAL

[19] The plaintiff appealed to this court, essentially against the termination of the SCA by the defendant and allowing the counterclaim; that the learned judicial commissioner misdirected himself in law and fact by deciding that the defendant as the main contractor had lawfully terminated the SCA.

OUR ANALYSIS AND DECISION

The terms of the subcontract agreement (SCA)

[20] Under the terms of the SCA, the plaintiff was to commence and complete the works in accordance with the period as stated in the letter of award and/or the main contract subject to any extensions allowed by the employer:

> 7. *COMPLETION TIME*
>
> 7.1 The Sub-Contractor shall commence and complete the Project in accordance with the time stated in the Letter of Award and or Main Contract and subject to any extensions allowed by the Employer.

[21] The plaintiff must strictly adhere to the approved work schedule of the project and in the event the plaintiff falls behind 5% or more of the works as scheduled due to whatever reasons, and a notice is issued by the employer to the defendant as the main contractor to that effect, the plaintiff under the terms of the SCA shall immediately upon being informed by the defendant in writing rectify the breach within 14 days from the date of the notice in writing:

> 11.3 The Sub Contractor shall in carrying out the work on the Project strictly adhere to the approved Work Schedule of the Project. In the event the Sub

> Contractor shall fall behind 5% (or more) of the Work Schedule due to whatsoever reasons, and a notice is issued by the Employer to the Main Contractor to that effect, the Sub Contractor shall immediately upon being informed by the Main Contractor in writing rectify the breach within 14 days ...

[22] If the plaintiff failed to complete the project or any part thereof within the period specified under the main contract or any extended period and/or periods, the plaintiff shall pay to the defendant a sum equivalent to the liquidated damages suffered or incurred by the defendant caused by the failure of the plaintiff as the defendant may be liable to pay the employer for the failure to complete the project or any part thereof:

> 9. *FAILURE TO COMPLETE*
>
> 9.1 If the Sub-Contractor fails to complete the Project or any part thereof within the period specified in the Main Contract or any extended period or periods as thereinafter provided it shall pay to the Main Contractor a sum equivalent to the liquidated damage suffered or incurred by the Main Contractor ...

[23] The salient terms of the SCA must be examined against the background as stated above. In determining whether there was a fundamental breach by the plaintiff the learned judicial commissioner as reflected in his grounds of judgment did not examine and consider in great detail the terms of the SCA except to state as follows:

> 57. In respect of clause 10, from the submissions by the plaintiff, it was contended that the SCA in the present case can only be determined under the circumstances as stated in the clause and as this clause was inserted and agreed by the parties, the court ought not to interpret and interfere with the intention of the parties. Furthermore, at the material time when the contract was signed, the parties had the benefit of legal advice. It was impressed upon the court that strict interpretation ought to be given to the clause as the responsibilities imposed on the plaintiff was a heavy one as the whole project had to be borne by the plaintiff while the defendant merely enjoys the passive income from the project.

[24] The court found that the plaintiff's alleged refusal to commence works was a fundamental breach. With respect, we do not agree with the analysis and finding of the learned judicial commissioner that the court ought not interpret and interfere with the intention of the parties as agreed under the terms of the SCA. In order to determine whether there was a fundamental breach he must first ascertain whether the parties strictly complied with the terms of the SCA. Instead the learned judicial commissioner opined that before determining whether there was a fundamental breach it is necessary for the court to consider and make findings of fact without analysing the terms of the SCA. In this case the factual matrix of the case must be considered together with the terms of the

SCA. By doing so the learned judicial commissioner will be able to determine whether there was indeed a fundamental breach of the terms of SCA justifying the termination by the defendant.

[25] The defendant had pleaded in its statement of defence ('SOD') that by the terms of the SCA they are expressly and/or implied permitted to terminate the agreement on 20 October 2014:

> 3. ... The Defendant however avers that clauses 10 and 11.3 when read together allows and/or impliedly allows the Defendant to terminate the said Agreement due to any delay by the Plaintiff and/or the Plaintiff's failure to rectify the breach by allowing the Defendant to engage additional workers or contractor to complete the said Project.

[26] The defendant through its solicitors, Messrs J Tan, Teoh Associates issued a letter dated 29 September 2014 due to the breach by the plaintiff notifying the defendant's intention to terminate the SCA with immediate effect and that it will proceed to appoint a new contractor. The letter, however, did not state or make any reference to any specific clause of the SCA forming the basis of the termination. It reads:

> Further we have on 15th September, 2014 wrote to your good office enclosing the letter from the Ministry of Education instructing our Clients to commence work on the said Project, again there was no reply from your Clients.
>
> In view of the aforesaid, it is our Clients' contention that your Clients do not wish to continue with the said Project thus are in breach of the abovementioned Subcontract Agreement.
>
> By reason of the aforesaid, we are instructed by our Clients to write to your good office to give notice that our Clients hereby *proceed to terminate the said Subcontract Agreement with immediate effect* and will proceed with appointing a new contractor to undertake the said Project and our Clients reserve their rights to take and actions necessary to recover any losses and damages that our Clients may suffer due to your Clients' breach of the terms and conditions of the Subcontract Agreement. (Emphasis added.)

[27] The plaintiff through its solicitors responded by a letter dated 30 September 2014 stating that the purported termination of the SCA was unlawful and that at the material time there was no confirmation in writing from MOE as the employer, agreeing to extend the date of completion of the project. By a letter dated 7 October 2014 the plaintiff forwarded to the defendant the plaintiff's proposed work program for the outstanding works as requested. The plaintiff through its solicitors vide a letter dated 10 October 2014 requested for confirmation in writing from the MOE of its agreement to extend the time for completion of the project by 1,227 days as indicated in the defendant's letter dated 4 September 2014. The defendant responded by

issuing a letter dated 20 October 2014 and it states:

> Further your Clients have delayed and fall behind more than five per centum (5%) of the work schedule and despite repeated reminder from our Clients your Clients has still failed to rectify the same.
>
> By reasons of the aforesaid, our Clients hereby invoke Clause 11.3 of the Subcontract Agreement ...

[28] Clause 10 SCA expressly states that the defendant shall not terminate the SCA unless the main contract itself between the employer has been determined, and the determination was in consequence of a breach of the said main contract. Clause 11.3 expressly stipulates that the plaintiff in carrying out the project shall strictly adhere to the approved work schedule and in the event the plaintiff fall behind 5% (or more) of the approved work schedule due to whatever the reasons may be, and notice was issued by the employer to the defendant, the plaintiff shall, if he had been duly informed, rectify the breach:

> 11.3 ... In the event the Sub Contractor shall fall behind 5% (or more) of the Work Schedule due to whatsoever reasons, *and a notice is issued by the Employer to the Main Contractor to that effect, the Sub Contractor shall immediately upon being informed by the Main Contractor in writing rectify the breach within 14 days from the date of Notice. Notwithstanding Clause 11 above,* in the event the *Sub Contractor shall fail to rectify* the breach, the Main Contractor shall at the expiration of the Notice reserve the right to engage additional workers ... *without prejudice to any right of action or other remedies that the Main Contractor may have against the Sub Contractor.* (Emphasis added.)

[29] In any written agreement there must be strict adherence to the terms of the agreement unless provided otherwise. Under the SCA if the plaintiff as the subcontractor fall behind 5% or more, then the following steps can be taken by the defendant as the main contractor:

(a) a notice is issued by the employer to the main contractor that the completion of works by the subcontractor is behind 5% or more;

(b) the subcontractor shall immediately upon being informed by the main contractor in writing rectify the breach *within 14 days from the date of notice*; and

(c) in the event the subcontractor *fails to rectify the breach, the main contractor shall at the expiration of the notice reserve the right to engage additional workers*.

[30] Learned counsel for the plaintiff argued that there was in fact no written notice by the employer that the plaintiff's performance was 5% or more behind the approved works schedule. No evidence was adduced before the High Court

that the plaintiff was immediately informed by the defendant in writing to rectify the breach within 14 days from the date of notice and that the plaintiff had failed to rectify the breach.

[31] Given that the employer had granted the second EOT this means that the parties were given more time to complete the project. The main contract between the employer and the defendant was not terminated but the completion date was extended giving time to the defendant and necessarily thus to the plaintiff to complete the project.

[32] Clause 10.1 SCA provides that:

> The Main Contractor *shall not determine this Agreement unless the Main Contract has been determined by the Employer* in consequence of any breach of this Sub Contract Agreement by the Sub Contractor. (Emphasis added.)

[33] Under cl 10 SCA the Defendant shall not terminate the SCA unless the main contract has been determined by the employer. In this case the main contract was still subsisting and there was no evidence adduced that the employer had any intention or had terminated the main contract. There was evidence adduced that the plaintiff had complied with more than 5% of the approved work schedule. DW3, the general manager of the defendant had on 29 October 2013 in the minutes of meeting, reported that the physical progress of the works was in fact more than 81%. The letter dated 20 October 2014 from the defendant did not make any reference of an intent to terminate but a request for additional security in order for the plaintiff to continue with the project. In the SOD the defendant had stated that the SCA was terminated on 20 October 2014 but this was not expressly stated in the letter. The letter dated 20 October 2014 merely indicated the intention to invoke cl 11.3 SCA. We observed by the letter dated 20 October 2014 the defendant had taken an entirely different position from its earlier letter dated 29 September 2014 which had expressed the defendant's intention to terminate the SCA with immediate effect.

[34] Whether there was a valid termination would be based on whether in the first place there was a valid reason to terminate as stipulated by the terms of the agreement. There must be a proper construction of the terms of the agreement, in this case the SCA. The reasons or grounds for termination are particularised in the agreement and the agreement gives a right of notice to rectify the breach. If no notice is given the party allegedly in breach would not have any knowledge of the breach complained of and thus unable to take the necessary steps to rectify. Having examined the terms of the SCA in its entirety, we are of the view that in this instant appeal before us the termination is bad in law. Firstly, termination is not permitted unless as stipulated under cl 10 SCA; that termination can only take place if the main contract was terminated,

which was not the case in this instant appeal. Secondly, cl 11.3 SCA is the termination clause but it allows the plaintiff to appoint another contractor to complete the works only if notice is given to the plaintiff to rectify an identified breach and the plaintiff must rectify that breach within the prescribed time given. If the plaintiff fails to rectify then the defendant can appoint another contractor.

[35] The defendant had ignored the express contractual term on termination when it decided to terminate the SCA. This court has repeatedly stated that the court cannot rewrite the terms of the contract agreed by the parties. In *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] UKPC 10, delivering the advice of the Board, Lord Hoffman said:

> The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. If it is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[36] Lord Pearson in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 remarked:

> ... the court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable. An unexpressed term can be implied if and only if courts finds that the parties must have intended that term to form part of their contract.

[37] As Lord Pearson in *Trollope* said the courts will not even improve the terms which the parties have made themselves, however desirable the improvement may be. In this regard the learned judicial commissioner made findings of fact without taking into consideration the terms of the SCA as agreed to by the parties. We agreed with the learned counsel for the plaintiff that cl 11.3 cannot be read independently of cl 10 in order to subvert the true intent of that clause. Based on the terms and conditions of the SCA the termination by the defendant is wrong in law for non-compliance with cll 10 and 11.3 of the SCA.

Section 40 of the Contracts Act 1950 ('the CA') A

[38] Before us learned counsel for the defendant argued that s 40 of the CA gives the right to the defendant to terminate the SCA when there is fundamental breach by the plaintiff. The plaintiff failed to commence works despite the repeated reminders and also the fact that the plaintiff was wound up. The defendant is entitled to exercise its right under common law to terminate the SCA. We do not agree with the approach the learned judicial commissioner adopted in his interpretation of s 40 of the CA. With respect, the conclusion and understanding by the learned judicial commissioner is plainly erroneous and demonstrates a misapplication of s 40 of the CA. Section 40 of the CA reads: B C

> When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuances. D

[39] Gopal Sri Ram JCA (as he then was) in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675; [1997] 1 CLJ 287 explained the application of s 40 of the CA. From the provision of s 40 of the CA, it is apparent that a contract is not automatically brought to an end by a repudiatory breach. The right to terminate or rescind a contract is not available in every case of repudiation. That right is dependent on, inter alia, the nature of the term breached, and the conduct of the parties, to ascertain whether the breach is of sufficient gravity to allow the other party to rescind the contract. In the Court of Appeal's decision in *Ching Yik* the principles were reminded that it is the function of the trial court to examine all the evidence led and determine the real facts in order to come to a decision on those material first principles: E F

> Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, ie, the party who is not guilty of the breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term. The rules that operate in this area of the law of obligations produce a further consequence. A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract. G H I
>
> Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed.

[40] The Court of Appeal further opined at p 682 (MLJ); p 296 (CLJ):

> Another approach to the problem in cases that involve synallagmatic contracts is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages but not to treat the contract as being at an end.

[41] In the case of *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151; [1983] 1 CLJ 178; [1983] CLJ Rep 363 the Federal Court examined the conduct of the parties to see if the right to rescind the contract upon the occurrence of a repudiatory breach had been waived by the other party. Upon examination, the Federal Court found that there was evidence of waiver; consequently, the right to rescind was no longer available and the contract was deemed to be still subsisting.

[42] The Supreme Court observed in *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; [1987] 1 CLJ 123; [1987] CLJ Rep 102,:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, vide the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v SDAECD France* [1919] AC 1.

[43] We are of the view that there was no judicial appreciation of the evidence by the learned judicial commissioner in coming to the conclusion that the defendant had lawfully terminated the SCA. Under s 40 of the CA the right of a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the plaintiff, the defendant may not put an end to the contract. In this case, on the facts the plaintiff had partially performed it obligations under the SCA.

CONCLUSION

[44] In conclusion after having heard the parties at length and upon careful perusal of the records of appeals, we were of the considered opinion that appellate intervention was warranted. In the circumstances, and for the reasons we have given, we were of the view that the decision of the High Court was

plainly wrong. Accordingly, we unanimously allowed the appeal and set aside the order of the High Court with costs of RM50,000 here and below to the appellant subject to payment of allocator. We entered judgment for the appellant. As a necessary consequence of the appeal, we ordered that the case be remitted to the High Court before the same judge to deal with the assessment of damages.

Appeal allowed unanimously, High Court's decision set aside, judgment entered for the appellant and the case remitted back to the High Court for assessment of damages for wrongful termination.

Reported by Ashok Kumar